

01633

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-167501

DATE: March 24, 1977

MATTER OF: Kinnett Dairies, Inc.

DIGEST:

Protest concerning reasonableness of contract prices and adequacy of anticipated competition in regard to determination not to set aside procurement for small business is denied, since such matters are business judgments requiring exercise of broad discretion by contracting officer which will not be questioned by GAO absent fraud or bad faith.

Invitation for bids (IFB) No. DSA13E-76-B-8570 was issued on August 31, 1976, by the Defense Supply Agency's Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania. The IFB solicited bids to supply four groups of milk and ice cream products on a requirements basis to Fort Benning, Georgia, for the period December 1, 1976, to May 31, 1977. Group I consisted of milk and milk products for troop issue and exchange cafeterias; Group II, of milk and milk products for commissary resale; Group III, of ice cream for troop issue and exchange cafeterias; and Group IV, of ice cream for commissary resale.

The IFB was initially issued as an unrestricted solicitation. Upon receipt of the IFB, Kinnett Dairies, Inc. (Kinnett), a small business, requested that the procurement be set aside exclusively for small business participation. The contracting officer then determined that, in accordance with Armed Services Procurement Regulation (ASPR) § 1-706.5(a)(1) (1976 ed.), Group I should be set aside for small business, and formalized that determination by the issuance of amendment 0001 to the IFB on September 14. In this connection, ASPR § 1-706.5(a)(1) (1976 ed.) provides in pertinent part:

"* * * the entire amount of an individual procurement * * * shall be set aside for exclusive small business participation * * * if the contracting officer determines that there is reasonable expectation that offers

will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices. Total set-asides shall not be made unless such a reasonable expectation exists. * * * Although past procurement history of the item or similar items is always important, it is not the only factor which should be considered in determining whether a reasonable expectation exists."

Subsequently, the Small Business Administration (SBA) representative to DPSC recommended that the entire procurement be amended to a small business set-aside, but the recommendation was rejected. An appeal by the SBA representative to the Chief of the Purchasing Office was denied. On September 24, Kinnett filed a protest with our Office against the decision not to restrict the entire procurement.

The contracting officer states that his determination to set aside Group I only was based upon a number of considerations. Since 1970, the procurement of resale milk and ice cream at Fort Benning, and since 1973, of troop issue milk and ice cream have been set aside exclusively for small business participation. Kinnett has received every award under those solicitations. In the last five procurements of troop issue milk (Group I under the present IFB), Kinnett's successful bid ranged from 0.3 percent to 9.9 percent lower than the second low bid, averaging 6 percent lower; for resale milk (Group II), the range was 4 percent to 15 percent, with a 9.92 percent average; for troop issue ice cream (Group III) the range was 22 percent to 65 percent, averaging 43.2 percent; and for resale ice cream (Group IV), the range was 16.7 percent to 59 percent, averaging 33.54 percent (these percentages are computed by dividing the second low bid by the difference between that bid and Kinnett's low bid). The contracting officer states the following concerning his preparation of the instant solicitation:

"The Contracting Officer had previously conducted extensive discussions with industry representatives and others familiar with the industry and, through these conversations and bolstered by his own experience, had determined that for a competitive situation to exist in the milk area vendors' offers should be within 6% of each other. The basis behind this rationale is that the milk industry is one of the most highly governmentally regulated businesses in

the nation. As a result, milk processors buy their raw milk at nearly identical prices in any given geographical area. The only elements which are added to this price are the vendor's profit margin after expenses and his transportation costs. * * *

The contracting officer further states that "Since the principal additions to a milk bidder's price are his profit and transportation factors," and since Kinnett is located 73 miles nearer to Fort Benning than any other small business bidder, "It is thus apparent * * * that Kinnett has a virtual lock-in on the procurement * * *. Due to this situation, no competition among the bidders exists and Kinnett, in actuality, has become a single source."

The contracting officer contends that, in view of this "single source" status, and since the large price ranges in the prior procurements of the group II, III, and IV items appear to indicate that there has been in fact no competitive pressure on Kinnett in bidding on those items, he has been unable to adequately support the reasonableness of Kinnett's prices. In this connection, the contracting officer argues that although he recognizes that the Government expects to and does pay a "premium" to small business by setting aside procurements for its exclusive participation, he is also bound by the direction of ASPR § 1-300.1 (1976 ed.) that "All procurements * * * shall be made on a competitive basis to the maximum practicable extent," and thus must ensure that such "premium" in fact is determined in an atmosphere involving the maximum amount of competition practicable.

Kinnett contends that the decision to restrict only a portion of the procurement is "arbitrary, capricious, without reason or foundation, and not based upon a consideration of all relevant factors." Kinnett argues that the selection of any percentage price differential as a basis for determining whether to set aside a procurement is improper. Kinnett contends that ASPR § 1-706.5(a)(1) (1976 ed.) "does not demand that competitive prices be tendered, but merely that competitive small business take part in the bidding." In this connection, Kinnett cites ASPR § 21-126(c)(1) (1976 ed.) and ASPR § 3-807(b)(1) (1976 ed.) to support its argument that the prior procurements at Fort Benning were in fact competitive. ASPR § 21-126(c)(1) (1976 ed.) provides in part:

"A contract shall be reported as 'price competition' if offers were solicited and received from at least two responsible offerors capable of satisfying the Government's requirements wholly or partially, and the award or awards were made to the offeror or offerors submitting the lowest evaluated prices. * * *"

ASPR § 3-807(b)(1) (1976 ed.) provides:

"Price competition exists if offers are solicited and (i) at least two responsible offerors (ii) who can satisfy the purchaser's * * * requirements (iii) independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price (iv) by submitting priced offers responsive to the expressed requirements of the solicitation. Whether there is price competition for a given procurement is a matter of judgment to be based on evaluation of whether each of the foregoing conditions (i) through (iv) is satisfied. * * *"

Kinnett points out that neither of those regulations mentions price spread, and contends that "both have been satisfied in every respect." Kinnett further argues that, in any case, procurements of the items in question at Fort Benning as small business set-asides had in fact resulted in reasonable prices, as evidenced by two "Price Reasonableness" memoranda prepared by the contracting officer in connection with the last procurement of milk and ice cream at Fort Benning, under which award was made to Kinnett. In one, the contracting officer states:

"Proposed prices are considered fair and reasonable based on adequate competition received and favorable comparison with previous prices paid. * * *

* * * * *

"* * * the proposed award prices are considered fair and reasonable."

In the second, the contracting officer states that "[b]ased on adequate competition received, price history and current trends the proposed award prices are considered fair and reasonable."

Kinnett also alleges that the prices at which it received the previous awards at Fort Benning were lower than those of other suppliers at four neighboring military installations and at supermarkets in the Fort Benning area; that Kinnett's location should be irrelevant; and that, had Kinnett known that the contracting officer was concerned with the differences in bidders' prices, it would have bid higher than it did so that its bids would have been closer to the second low bids.

In response to Kinnett's arguments, the contracting officer states that he used a 6-percent price range between small business bidders only as a guide in determining whether to set aside the procurement, not as a "hard and fast rule"; that when he prepared the two "Price Reasonableness" memoranda in issue he was new to the milk industry and lacked the experience and expertise to question prices received; that three of the "neighboring installations" to which Kinnett compares its prices under previous awards are in South Carolina where milk prices are "historically" higher than in Georgia; that Kinnett's comparison of its prices to commercial outlets is inaccurate and irrelevant; that Kinnett's location was only one consideration in the overall decision process; and that the previous large price spreads between Kinnett and the other bidders indicated that those bidders were not in fact in a competitive position rather than that Kinnett was intentionally bidding lower than it otherwise would have.

In regard to ASPR § 21-126(c)(1) (1976 ed.), the contracting officer points out that the regulation relates to reporting the extent and kind of a procurement competition for statistical purposes only and does not involve reasonableness of price. Finally, concerning ASPR § 3-807(b)(1) (1976 ed.), he argues in effect that "price competition" does not of itself ensure that award will be made at a reasonable price, but rather that the adequacy of such competition is the key factor, which he has determined to be inefficient in previous procurements of milk and ice cream products at Fort Benning.

Bids under IFB No. DSA13H-76-B-8570 were opened on November 3, with the following results:

B-187501

<u>Group</u>	<u>Apparent low responsive, responsible bidder</u>	<u>Size</u>
I (Restricted)	Dempsey Bros. Dairy	small business
II (Unrestricted)	Flav-O-Rich, Inc.	large business
III (Unrestricted)	Kinnett	small business
IV (Unrestricted)	Kinnett	small business

On November 14, Kinnett obtained a temporary restraining order in the United States District Court for the Middle District of Georgia against the award of any of the four groups. On November 24, the temporary restraining order was vacated as to groups I, III, and IV, and a preliminary injunction against the award of Group II was issued until further order of the court after our Office has made a determination on Kinnett's protest.

Under section 15 of the Small Business Act, 15 U.S.C. § 644 (1970), and its implementing regulations, procurements clearly may be negotiated with small businesses at higher prices to the Government than those that are otherwise obtainable through unrestricted competition. See 53 Comp. Gen. 307 (1973); 41 Comp. Gen. 306, 315 (1961). However, as indicated in ASPR § 1-706.5(a)(1) (1976 ed.), the prices at which awards under those procurements are made must in fact be reasonable. See also Park Manufacturing Company; Century Tool Company, B-185330, B-185331, B-185776, April 16, 1976, 76-1 CPD 260. Moreover, we agree with the contracting officer that, on the basis of ASPR § 1-300.1 (1973 ed.), as well as the language of ASPR § 1-706.5(a)(1) (1976 ed.) itself, the prices must be arrived at through "adequate," or "sufficient," competition. In this connection, ASPR § 3-807.1(b)(1)b (1976 ed.) provides in part:

"If conditions (i) through (iv) in a [ASPR § 3-807.1(b)(1)a] above [quoted above] are met, price competition may be presumed to be 'adequate' unless the purchaser (e.g., the contracting officer) finds that:

★ ★ ★ ★ ★

B-187501

"(ii) The low competitor has such a determinative advantage over the other competitors that he is practically immune to the stimulus of competition in proposing a price * * *."

See also DeWitt Transfer and Storage Company, B-182635, March 26, 1975, 75-1 CPD 180.

Determinations under ASPR § 1-706.5(a)(1) (1976 ed.) concerning both price reasonableness and whether adequate competition may reasonably be anticipated are basically business judgments requiring the exercise of broad discretion by the contracting officer. See Falcon Rule Company; Akron Rule Corporation, B-187024, November 16, 1976, 76-2 CPD 418; 45 Comp. Gen. 228 (1965). Therefore, in reviewing a set-aside protest situation, our Office will not substitute its judgment for that of the contracting officer and will sustain determinations concerning those matters absent bad faith or fraud. Tenco Construction Company, B-187137, December 21, 1976, 76-2 CPD 512; 45 Comp. Gen. supra.

Upon review of the entire record and consideration of the positions set forth above, we cannot conclude that the decision to set aside only Group I, on the basis that neither adequate competition nor reasonable prices could reasonably be anticipated for the other three groups, was arbitrary or made in bad faith, although it may in fact be open to question by one whose conclusion based upon the same facts and circumstances differs. Moreover, in view of ASPR § 3-807.1(b)(1)b (1976 ed.), the use of a price spread concept in making those determinations would not appear to be improper.

Accordingly, the protest is denied.

P. J. H. H.
Deputy Comptroller General
of the United States